Nurul Emarina bt Yazi & Ors v SPNB Aspirasi Sdn Bhd

HIGH COURT (SHAH ALAM) — SUIT NO BA-22NCvC-13–01 OF 2022
ROZI BAINON JC
22 MARCH 2023

Civil Procedure — Striking out — Application for — Plaintiffs signed sale and purchase agreement with defendant — Plaintiffs claimed for liquidated ascertained damages due to delay in delivering vacant possession of parcels and in completion of common facilities — Defendant applied to strike out plaintiffs' suit — Whether plaintiffs were entitled to claim for liquidated ascertained damages

The plaintiffs were the purchasers and/or owner of each house unit for a housing project named as Aspire Residence at Dengkil, Daerah Sepang, Selangor. The defendant was the developer for the housing project. The plaintiffs had signed the sale and purchase agreement ('the SPA') and had paid the booking fees to the defendant. The plaintiffs claimed for the liquidated ascertained damages ('LAD') due to the delay in delivering the vacant possession of the parcels and in completion the common facilities calculated from the expiry of 36 months from the payment of the booking fees. The defendant applied to strike out the plaintiffs' suit. In opposing the striking out application, the plaintiffs averred, inter alia, that: (a) the plaintiffs had the rights to claim for the LAD; and (b) the defendant as the developer had no right to depart and/or amend and/or change the period for the delivery of the vacant possession of the parcel and to complete the common facilities as stipulated in the SPAs that was from 36 months to 48 months. In defence, the defendant had pleaded that the development of the project was still ongoing.

Held, allowing the striking out application with costs:

(1) It was clear that the purchaser had not taken vacant possession of the parcel and the vendor had not completed the common facilities. The cause of action had not accrued yet. The defendant had yet to deliver the keys of the parcel to the plaintiffs, and therefore the cause of action had not accrued and the claims by the plaintiffs were pre-mature (see paras 24 & 28).

(2) Kementerian Kesejahteraan Bandar, Perumahan & Kerajaan Tempatan had allowed the defendant's application to vary the period of the delivery of vacant possession and completion of the common facilities from 36 months to 48 months. The approval was before the SPA signed by the plaintiffs. All of the plaintiffs were aware about the amendments. Therefore, no issue on extension and amendment on the period to deliver

the vacant possession and completion of the common facilities should be raised by the plaintiffs. The rights of the plaintiffs to claim for the LAD must be exercised once the plaintiffs been delivered with the vacant possession together with the common facilities (see paras 31 & 35).

[Bahasa Malaysia summary

Plaintif adalah pembeli dan/atau pemilik setiap unit rumah untuk projek perumahan yang dinamakan sebagai Aspire Residence di Dengkil, Daerah Sepang, Selangor. Defendan merupakan pemaju bagi projek perumahan itu. Plaintif telah menandatangani perjanjian jual beli ('PJB') dan telah membayar yuran tempahan kepada defendan. Plaintif menuntut ganti rugi yang ditentukan ('LAD') disebabkan oleh kelewatan dalam serahan milikan kosong petak-petak dan menyiapkan kemudahan bersama yang dikira dari tamat tempoh 36 bulan dari pembayaran yuran tempahan. Defendan memohon untuk membatalkan saman plaintif. Dalam menentang permohonan pembatalan tersebut, plaintif menegaskan, antara lain, bahawa: (a) plaintif mempunyai hak untuk menuntut LAD; dan (b) defendan sebagai pemaju tidak berhak untuk menangguhkan dan/atau meminda dan/atau menukar tempoh serahan milikan kosong petak itu dan melengkapkan kemudahan bersama seperti yang ditetapkan dalam PJB iaitu dari 36 bulan hingga 48 bulan. Dalam pembelaan, defendan telah memplid bahawa pembangunan projek itu masih diteruskan.

Diputuskan, membenarkan permohonan pembatalan dengan kos:

(1) Adalah jelas bahawa pembeli tidak mengambil milikan kosong petak itu dan penjual tidak melengkapkan kemudahan bersama. Kausa tindakan belum terakru lagi. Defendan masih belum menyerahkan kunci petak kepada plaintif, dan oleh itu kausa tindakan tidak terakru dan tuntutan oleh plaintif adalah pra-matang (lihat perenggan 24 & 28).

(2) Kementerian Kesejahteraan Bandar, Perumahan & Kerajaan Tempatan telah membenarkan permohonan defendan untuk mengubah tempoh serahan milikan kosong dan penyiapan kemudahan bersama daripada 36 bulan kepada 48 bulan. Kelulusan adalah sebelum PJB ditandatangani oleh plaintif. Semua plaintif sedar tentang pindaan itu. Oleh itu, tiada isu lanjutan dan pindaan mengenai tempoh untuk menyerahkan milikan kosong dan penyiapan kemudahan bersama harus dibangkitkan oleh plaintif. Hak plaintif untuk menuntut LAD mesti dilaksanakan sebaik sahaja plaintif diserahkan dengan milikan kosong bersama kemudahan bersama (lihat perenggan 31 & 35).]

Cases referred to

Alpine Return Sdn Bhd v Matthew Ng Hock Sing & Ors [2021] MLJU 1923; [2022] 1 CLJ 120, HC (refd)

Aminnudin Rezal bin Jaafar & Ors v Prema Bonanza Sdn Bhd [2021] MLJU 2783; [2022] 2 CLJ 914, HC (refd)
Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2010] 1 CLJ 162, FC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Encony Development Sdn Bhd v Robert Geoffrey Gooch & Anor [2016] 3 MLJ 400; [2016] 1 CLJ 893, CA (refd)
Muniandy v Tan Peck Soo & Ors [1990] 1 MLJ 502, HC (refd)
PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60, FC (refd)
Sekemas Sdn Bhd v Lian Seng & Co Sdn Bhd [1989] 2 MLJ 155, SC (refd)
Sentul Raya Sdn Bhd v Hariram a/l Jayaram and Others [2008] MLJU 308; [2008] 4 CLJ 618, CA (refd)
Tractors Malaysia Bhd vTio Chee Hing [1975] 2 MLJ 1, PC (refd)
Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141; [2009] 6 CLJ 232, FC (refd)
Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd and another appeal [2023] 2 MLJ 776; [2023] AMEJ 0264, CA (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989
Rules of Court 2012 O 18 r 19(1)
Specific Relief Act 1950 s 19
Temporary Measures for Reducing The Impact of Coronavirus Disease 2019 (COVID-19) Act 2020

Nur Amalina bt Haris (Abu Dzarr & Nazri) for the plaintiffs.
Zunnasri bin Sarbini (Mimirahayu Haniff Heng & Partners) for the defendant.

Rozi Bainon JC:

INTRODUCTION

[1] The plaintiffs are the purchasers and/or owner of each house unit for a housing project named as Aspire Residence at Dengkil, Daerah Sepang, Selangor. The defendant is the developer for the housing project.

[2] The plaintiffs had signed the sale and purchase agreement ('the SPA') as stipulated in para 5 of the statement of claim and had paid the booking fees to the defendant.

[3] Failure to deliver the vacant possession of the parcel to the purchaser in

the manner stipulated in cl 27 within 48 calendar months from the date of the SPA, the developer shall be liable to pay to the purchaser liquidated damages calculated from day to day at the rate of 10%pa of the purchase price from the expiry date of the delivery of vacant possession until the date the purchaser takes vacant possession of the said parcel.

[4] Failure to complete the common facilities serving the said housing development by the developer within 48 calendar months from the date of the SPA, the developer shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 10%pa of the last 20% of the purchase price.

[5] In supporting their claims, the plaintiffs cited the Federal Court decision in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60, that they are entitle to claim for the LAD calculated from the expiry of 36 months from the payment of the booking fees.

[6] The plaintiffs also relied on the Official Statement issued by the defendant on 6 May 2021, amongst others, had stated that:

(a) sehingga 13.04.2021, kemajuan kerja bagi Projek tersebut adalah lapan puluh peratus (80%) dan Defendan sedang berusaha untuk menyiapkan baki dua puluh peratus (20%) yang melibatkan kerja-kerja kemasan arkitek serta ujian bagi kerja mekanikal, infra, dan mendapatkan kelulusan dari jabatan-jabatan berkaitan dengan Sijil Pematuhan dan Kesiapan ('CCC');

(b) Projek tersebut akan disiapkan pada penghujung tahun 2021 bagi Blok 1, Fasa 1;

(c) Defendan dari semasa ke semasa akan berhubung dengan para pembeli bagi memaklumkan status terkini Projek tersebut menerusi laman web, media sosial, emel, dan telefon melalui pusat panggilan Defendan; dan

(d) Defendan komited untuk menyiapkan dan menyerahkan milikan kosong dan mematuhi terma-terma dan syarat-syarat yang telah ditetapkan oleh kerajaan berkenaan terma gantirugi jumlah tertentu yang telah ditetapkan di dalam Perjanjian-Perjanjian tersebut dan kaedah untuk mengurangkan kesan yang ditanggung oleh pembeli-pembeli.

[7] At all material time, the plaintiff are able and capable to fulfil their obligations as stipulated in the SPA entered with the defendant, therefore the plaintiffs pleaded that the SPA must specifically enforced by the defendant to complete the project and to deliver the vacant possession and the common facilities as described to the plaintiffs within the reasonable period as determined by this court.

[8] The plaintiffs pleaded that the breach of the SPA by the defendant had caused damage to the plaintiffs.

ENCLOSURE 7 (NOTICE OF APPLICATION BY THE DEFENDANT TO STRIKE OUT THE CLAIMS)

[9] The defendant's application to strike out the plaintiffs suit is filed on 8 November 2022 ('encl 7') pursuant to O 18 r 19(1) Rules of Court.

[10] In the affidavit in support affirmed by Nordina bt Mohd Tajudin (No K/P 790908–14–5824), Pengurus Unit Perundangan bagi Kumpulan Syarikat Perumahan Negara Bhd, whereby the defendant is the subsidiary company, had stated that the plaintiffs' suit must be dismissed on the grounds that:

(a) delivery of vacant possession:

> Bagi Plaintif Pertama hingga Plaintif ke-33, klausa 25(1) Perjanjian Jual Beli tersebut memperuntukkan pemilikan kosong Parsel tersebut hendaklah diserahkan kepada Plaintif-Plaintif mengikut cara yang dinyatakan dalam klausa 27 dalam tempoh 48 bulan dari tarikh Perjanjian Jual Beli tersebut. Manakala, bagi Plaintif ke-34, dalam tempoh 36 bulan dari tarikh Perjanjian Jual Beli tersebut.
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> Menurut klausa 25(2) Perjanjian Jual Beli tersebut, sekiranya Defendan gagal berbuat demikian, Defendan akan membayar Plaintif-Plaintif ganti rugi jumlah tertentu yang dikira dari hari ke hari pada kadar 10% setahun daripada harga beli dari tarikh luput penyerahan pemilikan kosong sehingga tarikh Plaintif-Plaintif mengambil milikan kosong Parsel tersebut.
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> Menurut klausa 25(4) Perjanjian Jual Beli tersebut, apa-apa kausa tindakan untuk menuntut ganti rugi jumlah tertentu oleh Plaintif-Plaintif adalah terakru pada tarikh Plaintif-Plaintif mengambil pemilikan kosong Parsel tersebut.

(b) completion of the common facilities:

> Bagi Plaintif Pertama hingga Plaintif ke-33, klausa 29(1) Perjanjian Jual Beli tersebut memperuntukkan Kemudahan Bersama hendaklah disiapkan dalam tempoh 48 bulan dari dari tarikh Perjanjian Jual Beli tersebut. Manakala, bagi Plaintif ke-34, dalam tempoh 36 bulan dari tarikh Perjanjian Jual Beli tersebut.
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> Menurut klausa 29(2) Perjanjian Jual Beli tersebut, sekiranya Defendan gagal berbuat demikian, Defendan akan membayar Plaintif-Plaintif ganti rugi jumlah tertentu yang dikira dari hari ke hari pada kadar 10% setahun daripada 20% terakhir harga belian.
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> Menurut klausa 29(3) Perjanjian Jual Beli tersebut, apa-apa kausa tindakan untuk menuntut ganti rugi jumlah tertentu oleh Plaintif-Plaintif adalah terakru pada tarikh Defendan menyiapkan Kemudahan Bersama.

8. Saya menyatakan bahawa setakat tindakan ini difailkan, pemilikan kosong Parsel tersebut masih belum diserahkan kepada Plaintif-Plaintif.

9. Saya juga menyatakan bahawa setakat tindakan ini difailkan, kemudahan Bersama bagi pemajuan tersebut masih belum disiapkan.

10. Saya juga menyatakan bahawa fakta-fakta ini dipersetujui oleh Plaintif-Plaintif sepertimana yang diplidkan dalam perenggan 21 pernyataan tuntutan tersebut dan perenggan 13(b) jawapan kepada pembelaan tersebut.

11. Saya menyatakan bahawa kemajuan penyiapan Projek tersebut ada dimaklumkan kepada Plaintif-Plaintif dari semasa ke semasa dan Plaintif-Plaintif juga telah dimaklumkan sebab kelewatan penyiapan Projek tersbeut.

12. Saya juga menyatakan bahawa pembinaan Projek tersebut masih berterusan dan setakat tarikh 30-9-2022 kemajuan keseluruhan Projek tersebut adalah 71.9%.

13. Dalam keadaan yang demikian di mana Plaintif-Plaintif masih belum mengambil pemilikan kosong Parsel tersebut dan Kemudahan Bersama masih belum disiapkan, ... tindakan yang diambil oleh Plaintif-Plaintif adalah menyalahi klausa 25 dan 29 Perjanjian Jual Beli.

14. ... writ tersebut yang difailkan oleh Plaintif-Plaintif untuk menuntut ganti rugi jumlah tertentu adalah secara jelas satu tindakan pra matang, tidak mendedahkan apa-apa kausa tindakan dan adalah suatu penyalahgunaan proses Mahkamah.

[11] On 10 January 2023, I allowed the striking out with costs.

OBJECTIONS BY THE PLAINTIFF ON THE STRIKING OUT'S APPLICATION

[12] In opposing the striking out application, the plaintiffs averred as follows:

(a) the plaintiffs had the rights to claim for the LAD due to the delay in delivering the vacant possession of the parcels and in completion the common facilities.

For this argument, the plaintiffs stated that the defendant is bound under cll 25(2) and 29(2) of the SPAs and Schedule H of the Regulations to pay the LAD to the plaintiffs.

The learned counsel for the plaintiffs cited the decisions in *Sentul Raya Sdn Bhd v Hariram a/l Jayaram and Others* [2008] MLJU 308; [2008] 4 CLJ 618 (CA); *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232; *Encony Development Sdn Bhd v Robert Geoffrey Gooch & Anor* [2016] 3 MLJ 400; [2016] 1 CLJ 893; *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan*

Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2010] 1 CLJ 162; *Aminnudin Rezal bin Jaafar & Ors v Prema Bonanza Sdn Bhd* [2021] MLJU 2783; [2022] 2 CLJ 914.

Based on the decisions of the above cases, the learned counsel for the plaintiffs submitted that the defendant as the developer has no right to depart and/or amend and/or change the period for the delivery of the vacant possession of the parcel and to complete the common facilities as stipulated in cll 25(1) and 29(1) of the SPAs that is from 36 months to 48 months. Any amendment to the cll 25(1) and 29(1) of the SPAs should be held void, unenforceable, revoked and/or in breach of the law;

The period to deliver the vacant possession of the of the parcel and to complete the Common Facilities by the defendant is only 36 months;

(b) the defendant is bound under cll 25(2) and 29(2) of the SPAs and Schedule H that provide (the emphasises are added by the plaintiffs):

Clause 25 (2):

> If the developer *fails to deliver vacant possession* of the said parcel *in the manner stipulated in clause 27 herein within the time stipulated in subclause (1), the developer shall be liable to pay to the purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum* of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the purchaser takes vacant possession of the said parcel.

Clause 29 (2):

> If the developer *fails to complete the common facilities in time the developer shall pay immediately to the purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.*

(c) at all material time, the defendant did not dispute that to date the project is still incomplete and the period had bypassed the prescribed timeline of 36 months.

[13] The learned counsel for the plaintiff submitted that based on the decision in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60, the plaintiffs have the rights to claim for the LAD calculated from the payment of the booking fee to the date of filing the writ of summon and statement of claim.

The plaintiffs had calculated the delays in days and the calculation had excluded the 167 days as given under Akta Langkah-Langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus (COVID-19) 2020.

[14] For the specific performance relief, the plaintiff are entitled to proceed and demand that the defendant to deliver the vacant possession of the parcel and to complete the Common Facilities in the reasonable period as specified by this court.

[15] As in the defence, the defendant had pleaded that the development of the project is still ongoing and as at 30 September 2022 the progress of the whole project is 71.91% and the estimated time to complete is in September 2023.

Thus, the plaintiffs pleaded that under s 19 of the Specific Relief Act 1950, the court can order the defendant for specific performance and liquidation of damages not a bar to specific performance.

The learned counsel for the plaintiff referred to the case of *Sekemas Sdn Bhd v Lian Seng & Co Sdn Bhd* [1989] 2 MLJ 155 (SC).

THE LAW ON STRIKING OUT

[16] The law on striking out is settled and provided in O 18 r 19(1) of the Rules of Court 2012 and in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36.

[17] This court needs to decide whether the principles as held in *Bandar Builder Sdn Bhd & Ors* are met for the defendants' application to strike out the plaintiff's claims, namely:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under this rule;

(b) when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable';

(c) if there is a point of law which requires serious discussion; and

(d) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

EVALUATIONS AND FINDINGS OF THIS COURT

[18] The issue to be decided is whether the plaintiffs' claims are 'plain and obvious', whether there is any credible evidence to prove the claims as stated in the statement of claim had occurred or not in order for the plaintiffs to say there is a cause of action against the defendant.

[19] Next, this court must decide on the defendant's application to strike out

the claims, whether the defendant is protected under the provision of O 18 r 19 to protect them from vexed by hopeless litigation.

[20] The laws on LAD and the issues pertaining to delay in delivery of the vacant possession and/or the common facilities are provided in Housing Development (Control and Licensing) Act 1966 (Act 118) and the Regulations made under the Act.

[21] It is well settled that Act 118 is a piece of legislation that was called a social legislation in order to protect the house buyers. With that in mind, any term or provision in the statute must be interpreted in a way which ensures maximum protection for the house buyers against the developer (see *Ang Ming Lee* and *PJD Regency Sdn Bhd*).

[22] The defendant had admitted that the project had completed 71.91% and the estimated time to complete is in September 2023.

[23] This court would like to refer to the Court of Appeal decision in the case of *Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd and another appeal* [2023] 2 MLJ 776; [2023] AMEJ 0264, where the issue on LAD's claim for the delay in delivering the unit of houses and uncompleting the common facilities that is quite factually similar to the case before me YA Mohd Nazlan Mohd Ghazali (CA) delivering the judgment as follows:

> [4] Under the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations'), which was made pursuant to the Housing Development (Control and Licensing) Act 1966 ('the HDA'), specifically on the provision concerning the statutory sale and purchase agreement prescribed under Schedule H to the Regulations, where in respect of stratified properties, a developer like the respondent is required to deliver vacant possession of the parcels and to complete the common facilities of the residential development within 36 months. Failure on the part of the developer entitles the purchasers to be paid by the developer liquidated damages.
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> ...
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> [7] There can therefore be no dispute that the prescribed period of 54 months for delivery was clearly reflected in Clauses 25 and 27 of the SPA, as follows:
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> 25. Time for delivery of Vacant Possession
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> (1) Vacant possession of the said parcel shall be delivered to the purchaser in the manner stipulated in Clause 26 within fifty-four (54) calendar months from the date of this Agreement.
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> (2) If the Vendor fails to deliver vacant possession in the manner stipulated in Clause 26 within the time stipulated in sub-clause (1), the Vendor shall be liable to pay to the purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per

annum of the purchase price from the expiry date of the delivery of vacant possession in sub-clause (1) until the date the purchaser takes vacant possession of the said parcel. Such liquidated damages shall be paid immediately upon the date the purchaser takes vacant possession of the said parcel.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the purchaser under this clause shall accrue on the date the purchaser takes vacant possession of the said parcel.

27. Completion of common facilities

(1) The common facilities serving the said housing development shall be completed by the Vendor within fifty-four (54) calendar months from the date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centrum (20%) of the purchase price.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the purchaser under this clause shall accrue on the date the Vendor completes the common facilities.

[24] The defendant (the developer) had admitted that the project is still ongoing the progress of the works already reached 71.91% and the developer had stated that the project 'dijangka akan disiapkan pada September 2023'. It is clear that the purchaser had not taken vacant possession of the said parcel and the vendor had not completed the common facilities. The cause of action had not accrued yet.

[25] The learned counsel for the plaintiffs in replying to the learned counsel for the defendant's submission stated:

58. Selanjutnya Defendan juga membangkitkan isu bahawa tuntutan Plaintif-Plaintif adalah pra-matang dan Plaintif-Plaintif hanya berhak menuntut LAD setelah milikan kosong Parsel-parsel tersebut diserahkan dan setelah kemudahan bersama disiapkan.

59. Namun begitu, Plaintif-Plaintif berhujah bahawa tuntutan LAD adalah terakru secara serta-merta sebaik sahaja tempoh untuk Defendan menyerahkan milikan kosong Parsel-parsel tersebut dan menyiapkan kemudahan bersama tersebut tamat.

[26] The learned counsel for the plaintiff only cited the case of *Sentul Raya Sdn Bhd* and did not at all reproduce the clause in the SPA.

[27] In the written submission by the learned counsel for the defendant, cl

25(4) of the SPA stated:

> For the avoidance of doubt, any cause of action to claim liquidated damages by the purchaser under this clause shall accrue on the date the purchaser takes vacant possession of the said parcel.

And cl 29(3) of the SPA stated:

> For the avoidance of doubt, any cause of action to claim liquidated damages by the purchaser under this clause shall accrue on the date the developer completes the common facilities together with the architect's certification.

[28] The plaintiffs as the house buyers by all means can claim for the LAD as stipulated under the SPAs and the same SPAs also 'protected' the developer. The defendant had yet to deliver the keys of the parcel to the plaintiffs, and therefore the cause of action had not accrued and the claims by the plaintiffs are pre-mature.

[29] As regards to the extension to deliver the parcel and to complete the common facilities, the principles as stated in *Ang Ming Lee*'s case had been explained by YA Mohd Nazlan in the analysis and findings in *Vignesh Naidu Kuppusamy Naidu* as follows:

> Extension is void
>
> [14] Central to these appeals is the Federal Court decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ; [2020] 1 CLJ 162. *For present purposes, the most crucial ruling by the Federal Court in Ang Ming Lee is that* reg 11(3) of the Regulations which confers on the Housing Controller the powers to waive or modify any provisions in the statutory contract in Schedule H to the Regulations is ultra vires its enabling legislation, the Housing Development (Control and Licensing) Act 1966. The Housing Controller has no power to waive or modify the 36-months period stipulated in the prescribed statutory contract of sale.
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> [15] The following passages from the judgment of Her Ladyship Tengku Maimun Tuan Mat CJ encapsulates the essence of the decision of the Federal Court:
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> > [41] The legislative intent that the duties shall remain with the Minister, may be discerned from ss 11 and 12 of the Act. Under s 11, whilst the Controller is given the power to investigate on the reason why a licensed housing developer is unable to meet his obligation to the purchasers, or is about to suspend his building operations or is carrying on his business detrimental to the interests of the purchaser, it is the Minister who is empowered to give directions and to take such other measures for purposes of safeguarding the interests of the purchasers and for carrying into effect the provisions of the Act. Likewise under s 12 which provides for the powers of the Minister to give general directions as he considers fit, to the licensed housing developer for purposes of ensuring compliance with the Act. Such directions, which shall be given in writing, are binding on the developer.

...

[57] It was submitted for the developer that the purchasers would suffer greater hardship if the project is not completed as compared to not being able to claim for LAD. With respect, we fail to see the merit of this submission. If the developer fails to obtain an extension of time to deliver vacant possession, that in itself does not mean that the developer has failed to complete and hence, have abandoned the project. Whether or not the developer is granted an extension of time does not necessarily determine the fate of the project. The extension of time only determines payment of LAD. In this regard, we must not lose sight of the purchasers' obligations to pay for progress instalment to their respective housing financier and/or payment of rental to their landlord. It is a matter of balancing the commercial interest of a multi-million housing development company against the life-time loan commitment of a purchaser for a basic living necessity. As can be seen from the long line of authorities, it is the interests of the purchasers that prevail over that of the developer. We therefore hold that in allowing the Controller to waive or modify the terms and conditions of the contract of sale and in the process, denying the purchasers' right to claim for LAD as prescribed by the Minister under Schedule H, reg 11(3) does not comply with the description of the Regulations which is designed to protect the interests of the purchasers'.

[16] The underlying and overriding intention of the Federal Court in Ang Ming Lee as expressed in unmistakable fashion is to protect the interests of the purchasers, as the weaker parties in the sale and purchase agreements under the said Schedule H to the Regulations. The following is only one of the many emphasis on that point found in the judgment:

[40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find no contrary indication in the language, scope or object of the Act that such duty to safeguard the interests of the purchasers may be delegated to some other authority'.

[30] We find that the appellant's right to claim LAD only arose on the date he accepted delivery of vacant possession of his property unit, consistent with Clause 25 (2) of the SPA which states as follows: For the avoidance of doubt, any cause of action to claim for liquidated damages by the purchaser under this clause shall accrue on the date the purchaser takes vacant possession of the said parcel.

[31] Here, the appellant is deemed to have taken delivery of vacant possession of his property in early February 2017. Accordingly, the appellant's cause of action to claim LAD accrued on that date. The six years limitation period under s 6(1)(a) of the Limitation Act 1953 *would only expire in early February 2023. Since the instant suit was filed on 21 August 2020, which clearly is well within the limitation period, the appellant's claims are not barred by limitation.*

[36] *In our view, where the contractual breach concerns a claim for LAD as pleaded in this case, we do not think it is correct to hold that the cause of action accrues on the date of the SPA, despite the contention that the breach occurred when Clauses 25 and 27 were*

made to depart from Schedule H to the Regulations. We say so because of two principal reasons. (Emphasis added.)

[37] *First, no liquidated damages could be claimed by the appellant at that early stage as it could certainly not as yet be ascertained before delivery of vacant possession. The High Court in Toh Tiam Cheow & Ors v Berjaya Times Square Sdn Bhd* [2002] MLJU 120; [2002] 4 CLJ 301, *in the judgment of Arifin Zakaria J (later Chief Justice) plainly held as follows*:

> *It would appear that based on cl 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained*. (see also *Lim Yee Khei v Berjaya Times Square Sdn Bhd* [2002] MLJU 635; [2003] 1 CLJ 527 which applied Toh Tiam Cheow). (Emphasis added.)

[38] In other words, since the appellant is suing for liquidated damages for late delivery of vacant possession and late completion of common facilities it cannot be said that his cause of action to sue arises on the day the SPA was executed. Plainly, for the purpose of suing for LAD for late delivery of vacant possession and late completion of common facilities the appellant's *cause of action against the respondent is not triggered until and unless the date for delivery of vacant possession and date for completion of common facilities has passed*. (Emphasis added.)

[30] Paragraphs 20 to 25 in the learned counsel for the defendant's written submission stated:

20. Adalah dihujahkan bahawa Projek perumahan tersebut bukanlah satu projek yang terhenti atau terbengkalai di mana kemajuan penyaipan Projek tersebut ada dimaklumkan kepada Plaintif-Plaintif dari semasa ke semasa dan Plaintif-Plaintif juga telah dimaklumkan sebab kelewatan penyiapan Projek tersebut. Seterusnya adalah dihujahkan bahawa pembinaan Projek tersbeut masih berterusan dan setakat 30-9-2022 kemajuan keseluruhan Projek tersebut adalah 71.91%.

21. Defendan di dalam Notis Makluman Status Terkini bertarikh 11-10-2021, Defendan ada menjelaskan bahawa penularan pandemic COVID-19 dan penguatkuasaan perintah-perintah kawalan pergerakan menjadi sebab kemajuan kerja Projek tersebut terjejas dan tidak dapat disiapkan dalam tempoh-tempoh yang dinyatakan.

22. Di dalam kes *PJD Regency Sdn Bhd v Lee Kok Seng & yang Lain* [2021] 2 MLJ 60; [2022] 1 LNS 2217, mahkamah memutuskan:

> [29] Untuk isu ketiga, Mahkamah berpendapat bahawa tindakan Plaintif-Plaintif ini tidak dihalang oleh had masa memandangkan kausa tindakan hanya berbangkit setelah milikan kosong diserahkan dan kemudahan bersama disiapkan. Klausa 25(3) dan 27(3) Perjanjian Jual Beli telah menyatakan bahawa sebarang kausa tindakan untuk menuntut ganti rugi hanya terakru pada tarikh di mana pembeli-pembeli mengambil milikan kosong hartanah dan kemudahan bersama.

23. Berdasarkan dokumen dan kenyataan rasmi oleh Defendan, adalah jelas bahawa Projek perumahan tersebut adalah bukan projek yang terbengkalai. Sekiranya ia

adalah projek yang terbengkalai, Plaintif-Plaintif boleh membawa tindakan ke atas Defendan tanpa menunggu penyerahan milikan kosong dan penyiapan kemudahan bersama atas alasan pemilikan kosong Petak tersebut tidak akan dapat diserahkan kepada Plaintif-Plaintif dan kemudahan bersama tidak akan dapat disiapkan.

24. Di dalam kes *Ganda Selat Sdn Bhd v Mohammadi Mt Abu @ Ramli & Ors* [2019] MLJU 1651; [2019] 1 LNS 1997, Mahkamah telah memutuskan bahawa:

> [11] It cannot be disputed that the project has been declared as an abandoned project by the National Housing Development Department via its letter of 5-1-2018 and there is nothing before this Court to show that the revival of the project is in the pipeline. This case is to be distinguished from cases of *merely delayed delivery.*
>
> [22] The LAD premised on an abandoned housing project involves a claim which is owing and payable by the housing developer. The defendants are entitled to the LAD and the delivery of vacant possession which is now impossible due to the project being an abandoned project cannot be a prerequisite for the defendants to claim such rights as it would mean that the defendants will never be paid the LAD after all. That cannot be the intention of the Act pre or post amendments.

25. Maka, berdasarkan kepada kes *PJD Regency Sdn Bhd* dan *Ganda Selat Sdn Bhd* di atas adalah dihujahkan bahawa tindakan yang difailkan oleh Plaintif-Plaintif ini adalah suatu tindakan yang pra matang.

[31] As submitted by the learned counsel for the defendant, the issue on the amendment from 36 months to 48 months, Kementerian Kesejahteraan Bandar, Perumahan & Kerajaan Tempatan had allowed the defendant's application to vary the period of the delivery of vacant possession and completion of the common facilities from 36 months to 48 months. The approval by the Ministry was vide the letter dated 2 July 2014 that is before the SPA signed by the individual plaintiffs.

All of the plaintiffs are aware about the amendments. Therefore, no issue on extension and amendment on the period to deliver the vacant possession and completion of the common facilities should be raised by the plaintiffs.

[32] To support its argument, the learned counsel for the defendant cited the case of *Alpine Return Sdn Bhd v Matthew Ng Hock Sing & Ors* [2021] MLJU 1923; [2022] 1 CLJ 120, it was held:

> (2) The defendants, at the material time, even prior to the execution of the SPAs, were equally fully cognisant that the delivery of vacant possession of the parcels and the completion of common facilities for the project would be 60 months from the date of the SPAs. They had never expected, on the basis of the SPAs (inclusive of the terms on the purchase price, as discounted and granted rebate) receiving the delivery of vacant possession of the parcels together with the completed common

A facilities of Residensi Star within 36 months. The defendants had also never raised any objections towards the extension, such as after the first 36 months had lapsed, until after the decision in *Ang Ming Lee*, post the delivery of vacant possession by the plaintiff.

B **[33]** In order for this court to allow striking out, the case of *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 held that:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution.

C

[34] In the case of *Muniandy v Tan Peck Soo & Ors* [1990] 1 MLJ 502 where it is also trite that powers of the court to strike out pleadings ought to be sparingly exercised and only in very exceptional cases.

D **[35]** In my decision on 10 January 2023, this court finds that 'Kausa tindakan bagi tuntutan bayaran ganti rugi jumlah tertentu ('LAD') tersebut hanya terakru setelah plaintif-plaintif menerima serahan milikan kosong unit-unit kediaman mereka', therefore, the rights of the plaintiffs to claim for the LAD must be exercised once the plaintiffs been delivered with the vacant
E possession together with the common facilities.

[36] When this court made her decision in January 2023, it is about another nine months before the estimation of the date that the defendant will deliver
F the vacant possession and complete the common facilities. Failure to do so, the plaintiffs can bring the legal actions against the defendant for the LAD. And when that time comes, it is ascertain that there is liqudated damages caused to the plaintiffs.

G CONCLUSION

[37] In view of the foregoing, it is my judgment that having evaluated encl 9 and its supporting documents, I find that the plaintiffs had failed to establish that there is cause of action against the defendant and the plaintiffs claims are
H based on the SPA that binds both the plaintiffs and the defendant. The defendant did not breach the SPA. The plaintiffs only had rights to claim for the LAD when it is accrued.

[38] In view of the reasons as discussed above, I allow encl 9 with costs.
I

Striking out application allowed with costs.

Reported by Ahmad Ismail